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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 HOLLY A. NEILL, an individual; CORI
8 MULSOFF, an individual; BRENDA JONES,
9 an individual,

10 Plaintiffs,

11 v.

12 ALL PRIDE FITNESS OF WASHOUGAL,
13 LLC, a Washington Limited Liability
14 Corporation; CHINDIANAOPPLIS, a
15 Washington Limited Liability Corporation;
16 NILE PLOUFFE, an individual,

17 Defendants.

Case No. C08-5424RJB

ORDER DENYING PLAINTIFFS'
MOTION TO DISQUALIFY
DEFENDANTS' ATTORNEYS

18 This matter comes before the Court on Plaintiffs' Motion to Disqualify Defendants'
19 Attorneys. Dkt. 51. The Court has considered the pleadings filed in support of and in opposition to
20 the motion and the file herein.

21 **I. FACTS AND PROCEDURAL BACKGROUND**

22 On July 8, 2008, Plaintiff Holly Neill's application to proceed *in forma pauperis* was granted.
23 Dkt. 2. In her Complaint, Ms. Neill alleges that she was subjected to sexual harassment by
24 Defendant Nile Plouffe, a manager at All Pride Fitness of Washougal LLC and Chindianaoplis LLC,
25 the fitness club where she worked. Dkt. 3. Ms. Neill makes claims under: 1) Title VII, 42 U.S.C. §
26 2000, *et seq.*, 2) the Washington Law Against Discrimination ("WLAD"), RCW 49.60, *et seq.*, 3)
Title VII and WLAD's retaliation provisions, 4) Washington's common law prohibiting the
intentional infliction of emotional distress, and 5) RCW 49.48, *et seq.* and 49.52, *et seq.* for the

1 wrongful withholding of her wages. Dkt 3.

2 On January 7, 2009, Ms. Neill's Motion to Amend the Complaint was granted. Dkt. 32. An
3 Amended Complaint was filed, and two additional women, Cori Mulsoff and Brenda Jones, joined
4 the case as Plaintiffs, alleging they too suffered sexual harassment and other violations of their rights
5 at the hands of Defendants. Dkt. 34. Plaintiffs allege that they were jointly employed by Defendants
6 Chindianapolis, LLC and All Pride Fitness of Washougal ("All Pride"). *Id.* at 2. The Amended
7 Complaint alleges that Defendant Chindianaoplis "is a holding company of numerous fitness
8 companies." It further alleges that, "[a]s of September 2007, [Chindianaoplis] operated 25 separate
9 facilities and had hundreds of employees. [All Pride] is a subsidiary of [Chindianaoplis] and was a
10 holding of [Chindianaoplis] during the relevant period herein." *Id.*

11 Defendants are represented by David A. Nold and Brian Muchinsky of Nold & Associates,
12 PLLC. Dkt. 8. Mr. Nold acknowledges having a financial interest in Defendant Chindianaoplis.
13 Dkt. 56. Exploration of the nature of his interest, and a little about the relationship between the two
14 Defendant companies is helpful in deciding the motion.

15 To that end, the record contains a document entitled "Amended and Restated Limited
16 Liability Company Agreement of Chindianaoplis Limited Liability Company" ("Chindianaoplis
17 Amended LLC Agreement" or "Agreement"). Dkt. 55-2. This Agreement is dated June 27, 2007.
18 *Id.* The Agreement states that Mr. Nold owns 16.66% of Chindianaoplis, a Mr. and Ms. Bahlenhorst
19 own 66.68% , and a Mr. Valentine own 16.66%. *Id.*, at 1. Mr. Nold states that he is a "Member,"
20 (Dkt. 56) which the Agreement defines as "each person who executes a counterpart of this
21 Agreement and makes its Capital Contribution" (Dkt. 55-2, at 4) as opposed to a "Manager,"
22 defined as "John Bahlenhorst" (Dkt. 55-2, at 4). Although the Agreement states that, "[t]he current
23 members of the Company are listed on Exhibit A along with their membership interest," Defendants
24 failed to file the "Exhibit A." In any event, according to the Agreement, a "Member" votes on items
25 like election of Managers, setting compensation, and approving the operating plan. Dkt. 55-2, at 6.

1 Members must all consent to any “Major Decision” (Dkt. 55-2, at 6), defined in the Agreement as a
2 decisions like making a capital expenditure or incurring any debt over \$10,000. Dkt. 55-2, at 3.

3 The record also contains a document entitled “All Pride Fitness at Washougal, LLC Limited
4 Liability Company Agreement by and between Chindianaoplis, LLC and Fender Mill Consulting &
5 Investments, LLC and Karen Flynn” (“All Pride Agreement”), dated January 1, 2006. Dkt. 52-2, at
6 3. The All Pride Agreement creates two classes of Members in All Pride - Class A Members and
7 Class B Members. Dkt 52-2. Chindianaoplis is the only Class A Member. Dkt 52-2, at 7.
8 Accordingly, its consent is needed before a “major decision” is made, like the sale of the business, a
9 merger, an acquisition of land, the making of any non-budgeted expenditure in a sum of more than
10 \$10,000, or any decision regarding the financing of All Pride. Dkt. 52-2, at 6. The All Pride
11 Agreement also refers to a position of “General Manager,” who personally supervises the day to day
12 operations of All Pride. Dkt 52-2, at 6.

13 Defendant Nile Plouffe filed a Declaration in opposition to the motion, and states that he is
14 the “General Manager” of All Pride. Dkt. 57, at 1. Mr. Plouffe states that he received a letter from
15 Mr. Nold advising him of a potential conflict of interest between Mr. Plouffe and the other
16 Defendants. Dkt. 57, at 1. He states that upon consideration of the potential conflict of interest, he
17 consented to the joint representation in writing. Dkt. 57, at 1.

18 Mr. Bahlenhorst also filed a Declaration in opposition to the motion, and indicates that he
19 received a letter from Mr. Nold advising him of the potential conflict of interest. Dkt. 55. Mr.
20 Bahlenhorst states that he consented to the joint representation in writing. Dkt. 55.

21 Neither Mr. Nold’s letter to Mr. Plouffe or Mr. Bahlenhorst regarding a potential conflict of
22 interest, nor Mr. Plouffe’s or Mr. Bahlenhorst’s written consent to the joint representation originally
23 appeared in the record. This Court renoted the motion and gave Defendants an opportunity to
24 supplement the record. Dkt. 69. Defendants supplemented the record, and requested an opportunity
25 to provide the letter regarding the potential conflict of interest and consent to joint representation for
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1 *in camera* review. Dkts. 77-79. Defendants request was granted (Dkt. 88), and the letter regarding
2 the potential conflict of interest and consent to joint representation was sent to the Court and
3 reviewed *in camera*.

4 *PENDING MOTION*

5 In the instant motion to disqualify counsel, Plaintiffs argue that Mr. Nold is a managing
6 member of Chindianapolis, Chindianapolis has control over All Pride, and so his representation
7 appears to create a conflict or potential conflict of interest under Washington Rule of Professional
8 Conduct (“RPC”) 1.7. Dkt. 51. Plaintiffs argue that Mr. Nold and his associates failed to disclose
9 material facts and made false statements in the case regarding the nature of the relationship between
10 Chindianapolis and All Pride, and failed to disclose Mr. Nold’s financial interest in Chindianapolis.
11 *Id.* Plaintiffs argue further that Mr. Nold should be disqualified under RPC 3.7 - prohibiting a lawyer
12 from acting as an advocate and witness. Dkt. 51.

13 Defendants argue, in their Response, that Mr. Nold is not a managing member of
14 Chindianaoplis, but a minority member. Dkt. 53. Defendants acknowledge that Mr. Nold has a
15 16.66% interest in Chindianapolis, but argue that he does not, and never has had, any role as a
16 manager. *Id.* Defendants argue that John Bahlenhorst is the sole managing member of
17 Chindianaoplis. *Id.* (citing 55-2, at 11). *Id.* Accordingly, Defendants argue that Mr. Nold has no
18 conflict of interest under RPC 1.7 by virtue of his minority interest in Chindianaoplis and the fact that
19 the potential conflict was disclosed and knowingly waived by all Defendants. *Id.* Defendants urge
20 that Plaintiffs do not have standing to raise these issues. *Id.* Defendants argue that Plaintiffs’
21 counsel are mistaken when they argue that there has been a failure to disclose material facts to the
22 Court or the making of false statements. *Id.* They further argue that Mr. Nold will not be a
23 necessary witness at trial and should not be disqualified pursuant to RPC 3.7. *Id.*

24 Plaintiffs reply, arguing that it is undisputed that Mr. Nold failed to disclose his ownership
25 interest in Defendant Chindianaoplis for the past two years. Dkt. 62. Plaintiffs argue that Mr. Nold

1 has a decision-making role based upon the All Pride Agreement and Chindianaoplis Amended LLC
2 Agreement. *Id.* As to whether Defendants have withheld evidence, Plaintiffs point out that portions
3 of the Chindianaoplis Amended Agreement were not filed, including the “Exhibit A” which details
4 the “current members along with their ownership interests.” *Id.*, (citing Dkt. 55-2, at 1). Plaintiffs
5 argue that Mr. Nold has highly relevant information as a witness in this case, particularly as to the
6 number of employees at both Chindianaoplis and All Pride, which is relevant to their Title VII claims.
7 *Id.* Plaintiffs argue that Mr. Nold violated RPC 1.7 because he did not obtain a written waiver as to
8 his personal conflict of interest with his clients before representing them. *Id.* Plaintiffs argue that
9 Mr. Nold failed to obtain written informed consent for his business transactions with his clients under
10 RPC 1.8. *Id.* Plaintiffs argue that they have standing to attempt to have Mr. Nold disqualified and
11 such disqualification is imputed to his associates. *Id.*

12 Defendants file a Surreply, and argue that Plaintiffs raise their RPC 1.8 argument for the first
13 time in their reply, so it should be disregarded. Dkt. 66. Defendants state that Plaintiffs statement of
14 the status of discovery is false. Dkt. 66. Defendants also take issue with Plaintiffs’ characterizations
15 of the disclosure of the “conflict of interest” and other facts. *Id.* Defendants argue that Plaintiffs fail
16 to provide any authority for the proposition that Mr. Nold had a duty to disclose his ownership
17 interest. *Id.*

18 Plaintiffs’ counsel then files a letter to the Court, objecting to the Surreply. Dkt. 68.
19 Plaintiffs’ counsel argues that it was not filed pursuant to the Local Federal Rules of Civil Procedure.
20 *Id.* Plaintiffs’ counsel then states that Plaintiffs “request this Court to consider whether an alternative
21 remedy may be more appropriate than disqualification.” *Id.* The letter continues, “Plaintiffs are
22 primarily concerned that Defendants’ continued threats, accusations, and personal attacks may be
23 caused by Mr. Nold’s personal stake in the outcome of the litigation.” *Id.*

24 This opinion will first consider the appropriateness of the Surreply, then Plaintiffs’ Motion to
25 Disqualify Defendants’ Attorneys, and lastly, other issues discussed by the parties.

II. DISCUSSION

A. SURREPLY

Local Fed. R. Civ. P. 7(g) provides that requests to strike material contained in or attached to a reply brief may be filed in a surreply, subject to the following: (1) the party requesting that the court strike the material must file a notice of intent to file a surreply, (2) the surreply must be filed within five judicial days of the filing of the reply brief, and “shall be strictly limited to addressing the request to strike,” (3) the surreply shall not exceed three pages, and (4) no response shall be filed unless requested by the court.

Defendants’ Surreply (Dkt. 66), does not move to strike any material contained in or attached to a reply brief. Plaintiffs’ counsel’s letter (Dkt. 68) was not requested by the Court. Neither of these pleadings were properly filed, and should be stricken.

B. MOTION TO DISQUALIFY

The Court first refers to the local rules regulating the conduct of members of its bar in determining whether an attorney's representation of a particular client violates the attorney's ethical responsibilities. *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983); *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp. 2d 1000 (W.D.Wash. 2007). Local General Rule 2(e), “Standards of Professional Conduct,” provides that:

In order to maintain the effective administration of justice and the integrity of the Court, attorneys appearing in this District shall be familiar with and comply with the following materials (“Materials”) (1) The Local Rules of this District, including the Local Rules that address attorney conduct and discipline; (2) the Washington Rules of Professional Conduct, as promulgated, amended and interpreted by the Washington State Supreme Court (the “RPC”), and the decisions of any court applicable thereto; ... In applying and construing these Materials, this Court may also consider the published decisions and formal and informal ethics opinions of the Washington State Bar Association, the Model Rules of Professional Conduct of the American Bar Association and Ethics Opinions issued pursuant to those Model Rules, and the decisional law of the state and federal courts.

Plaintiffs argue that Mr. Nold’s representation of Defendants violates or may violate RPC 1.7, 1.8, and 3.7. Dkts. 51, and 62. Plaintiffs’ argue that Mr. Nold should be disqualified, or an

1 “alternative action” should be taken against him. *Id.* Plaintiffs further argue that Mr. Nold’s
2 disqualification necessitates the disqualification of his firm, including Mr. Muchinsky under RPC
3 1.10. *Id.*

4 1. Washington Rule of Professional Conduct 1.7

5 RPC 1.7 provides that:

6 (a) A lawyer shall not represent a client if the representation involves a concurrent
7 conflict of interest. A concurrent conflict of interest exists if: (1) the representation of
8 one client will be directly adverse to another client; or (2) there is a significant risk
9 that the representation of one or more clients will be materially limited by the lawyer's
10 responsibilities to another client, a former client or a third person or by a personal
11 interest of the lawyer.

12 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph
13 (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the
14 lawyer will be able to provide competent and diligent representation to each affected
15 client; (2) the representation is not prohibited by law; (3) the representation does not
16 involve the assertion of a claim by one client against another client represented by the
17 lawyer in the same litigation or other proceeding before a tribunal; and (4) each
18 affected client gives informed consent, confirmed in writing (following authorization
19 from the other client to make any required disclosures).

20 a. *Existence of Concurrent Conflict of Interest*

21 This opinion will now discuss the sources of a potential conflict of interest - Mr. Nold’s
22 interest in Defendant Chindianaoplis and his representation of all three Defendants.

23 i. Mr. Nold’s Interest in Chindianaoplis

24 Plaintiffs have failed to make a showing that Mr. Nold’s interest in Chindianaoplis creates a
25 sufficient concurrent conflict of interest so as to require his disqualification from representation of
26 the Defendants, or that other action be taken against him here. There has not been a showing that his
“personal interests” are in conflict with the Defendants’ interests. If Plaintiffs prevail in this
litigation, both the Defendants and Mr. Nold are adversely affected.

Plaintiffs cite to Washington State Bar Association Informal Ethics Opinion 1068. Dkt. 51,
at 7. That Opinion noted that a lawyer could “both serve on the board of directors and be general
counsel” of a business so long as the lawyer made a determination as to whether the responsibilities

1 of the roles might conflict under RPC 1.7. The Opinion stated “that if there is a material risk that the
2 dual role would compromise [the lawyer’s] independent and professional judgment, [the lawyer]
3 should not serve as a director.” The situation presented here is much less concerning than the one
4 considered in the Opinion. Here, Mr. Nold is not the “Manager” of either the two companies,
5 although it appears that he has some decision making power as a “Member” of Chindianaoplis. Dkt.
6 55-2, at 6 (Chindianaoplis Amended LLC Agreement - Members must all consent to any “Major
7 Decision”). Mr. Nold is not general counsel, but is representing these Defendants in this litigation.
8 He states that he did not form either Chindianaoplis or All Pride. Dkt. 56, at 2. He did not represent
9 either entity when they were formed. *Id.* There is insufficient evidence to show that Mr. Nold’s
10 personal interest in Chindianaoplis has compromised his professional judgement. Plaintiffs have
11 failed to show that Mr. Nold should be disqualified on this basis, or other action taken against him,
12 pursuant to RPC 1.7.

13 ii. Representation of All Three Defendants - Chindianaoplis, All
14 Pride and Mr. Plouffe

15 Upon consideration of the facts in this case, it appears that there could be a potential conflict
16 of interest in Mr. Nold’s representation of all three Defendants. Accordingly, the Court turns to the
17 issue of whether each client was informed of the potential concurrent conflict of interest and
18 consented to the joint representation, in writing.

19 b. *Informed Consent*

20 RPC 1.7(b) requires that “each affected client gives informed consent, confirmed in writing”
21 to a potential concurrent conflict of interest. At the present time, it appears that Defendants have
22 been informed of the potential conflict of interest between the corporate Defendants and Mr. Plouffe.
23 Dkt. 92. Each consented in writing to the joint representation. *Id.* Defendants should be aware,
24 however, that it is possible that the Defendants’ best interests may still at some point in time diverge.
25 It is the Court’s expectation that Mr. Nold be ever vigilant regarding his obligations under the Rules
26

1 of Professional Conduct.

2 2. Washington Rule of Professional Conduct 1.8

3 RPC 1.8 provides that:

4 (a) A lawyer shall not enter into a business transaction with a client or knowingly
5 acquire an ownership, possessory, security or other pecuniary interest adverse to a
6 client unless:

7 (1) the transaction and terms on which the lawyer acquires the interest are fair and
8 reasonable to the client and are fully disclosed and transmitted in writing in a manner
9 that can be reasonably understood by the client;

10 (2) the client is advised in writing of the desirability of seeking and is given reasonable
11 opportunity to seek the advice of independent legal counsel on the transaction; and

12 (3) the client gives informed consent, in a writing signed by the client, to the essential
13 terms of the transaction and the lawyer's role in the transaction, including whether the
14 lawyer is representing the client in the transaction.

15 Plaintiffs make no showing that Mr. Nold's conduct here merits disqualification of his
16 representation of the Defendants under RPC 1.8. Although Mr. Nold indicates that he has provided
17 legal services to Mr. Bahlenhorst and other entities owned by Mr. Bahlenhorst, (Dkt. 56, at 2), there
18 is no evidence in the record that Mr. Nold violated RPC 1.8 in his dealings with Mr. Bahlenhorst. It
19 appears Mr. Nold did not operate as Mr. Bahlenhorst's attorney for the transactions wherein the two
20 Defendant companies were created. Dkt. 56, at 2. Moreover, Plaintiffs fail to show the relevance of
21 this argument to the case at bar. In any event, Plaintiffs improperly raise the argument in the Reply,
22 and it should be disregarded.

23 3. Washington Rule of Professional Conduct 3.7

24 RPC 3.7 provides that:

25 (a) A lawyer shall not act as advocate at a trial in which the lawyer is
26 likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) disqualification of the lawyer would work substantial hardship on the client; or

(4) the lawyer has been called by the opposing party and the court rules that the
lawyer may continue to act as an advocate; or

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's
firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or
Rule 1.9.

1 When interpreting these provisions, Washington courts are reluctant to disqualify an attorney
2 absent compelling circumstances. *PUD No. 1 of Klickitat County v. International Ins. Co.*, 124
3 Wn.2d 789, 812 (1994). “A motion for disqualification must be supported by a showing that the
4 attorney will give evidence material to the determination of the issues being litigated, that the
5 evidence is unobtainable elsewhere, and that the testimony is or may be prejudicial to the testifying
6 attorney’s client.” *Id.*

7 Plaintiffs have failed to show at this stage in the litigation that Mr. Nold should be
8 disqualified under RPC 3.7, or that other action should be taken against him. Trial is set for October
9 5, 2009, and so is months away. Dkt. 28. Mr. Nold has not yet been named a witness. While Mr.
10 Nold has made some reference to the numbers of employees of both the Defendant companies,
11 Plaintiffs have not made a showing that the evidence is unobtainable elsewhere - like the company’s
12 employment records. Plaintiffs have not made a sufficient showing for Mr. Nold’s disqualification.

13 4. Washington Rule of Professional Conduct 1.10

14 Under RPC 1.10(a), “while lawyers are associated in a firm, none of them shall knowingly
15 represent a client when any one of them practicing alone would be prohibited from doing so by Rules
16 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not
17 present a significant risk of materially limiting the representation of the client by the remaining
18 lawyers in the firm.” Disqualification prescribed by RPC 1.10 (a) may be waived by the affected
19 client under the conditions stated in Rule 1.7. RPC 1.10 (c).

20 Plaintiffs have failed to show that Mr. Nold should be disqualified from representing the
21 Defendants. Accordingly, no showing has been made to disqualify the members of his firm.

22 5. Conclusion on Motion to Disqualify

23 The Motion for the Disqualification of Defendants’ Attorneys (Dkt. 51) should be denied.
24 Plaintiffs have not shown that Mr. Nold or his firm have violated the Washington Rules of
25 Professional Conduct in a manner requiring disqualification or necessitating other action. The Court

1 assumes that all parties and counsel are aware of the old saw that “a lawyer who represents himself
2 has a fool for a client.”

3 **C. DISCLOSURE OF INFORMATION**

4 Parties make reference to discovery issues and the failure to disclose material facts to the
5 Court. No motion appears to have been made by either party in these pleadings. Plaintiffs have now
6 filed a Motion to Compel, which is noted for consideration on May 8, 2009. Dkt. 85.

7 **D. CIVILITY**

8 Parties are again warned to conduct themselves according to the highest professional
9 standards. Name calling will not be tolerated. As should now be apparent, the Rules of Professional
10 Conduct apply.

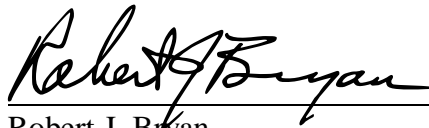
11 **III. ORDER**

12 Therefore, it is hereby **ORDERED** that:

- 13 • Defendants’ Surreply (Dkt. 66) and Plaintiffs’ counsel’s letter (Dkt. 68) **ARE STRICKEN**,
14 • Plaintiffs’ Motion to Disqualify Defendants’ Attorneys (Dkt. 51) is **DENIED**.

15 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of
16 record and to any party appearing *pro se* at said party’s last known address.

17 DATED this 4th day of May, 2009.

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20 Robert J. Bryan
21 United States District Judge
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